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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Statement of the)
)
Public Utilities Commission of) PR File No. 94-SP7
Ohio's Intention to Preserve Its)
Right for Future Rate and Market)
Entry Regulation of Commercial)
Mobile Radio Services)

94-109

COMMENTS OF SPRINT CELLULAR COMPANY

Pursuant to the Public Notice¹ of the Federal Communications Commission ("FCC"), Sprint Cellular Company² files its Comments in response to the Statement of the Public Utilities Commission of Ohio's ("PUCO") Intention to Preserve Its Right for Future Rate and Market Entry Regulation of Commercial Mobile Services (the "Statement"). Sprint Cellular Company requests expedited processing of the Statement and its associated comments in order to remove regulatory uncertainty for Ohio commercial mobile radio service ("CMRS") providers. Expedited processing should not

1 Public Notice, State Petitions to Retain Authority Over Intrastate Mobile Service Rates, DA 94-876, 59 Fed. Reg. 42,595 (1994).

2 Sprint Cellular Company provides cellular services in the state of Ohio through its operation and management of four metropolitan and four rural service areas.

pose an undue burden on the FCC's resources because the Statement does not include factual showings that may require extended analysis.

It is not entirely clear what relief, if any, PUCO requests of the FCC. The Statement apparently is directed to two objectives: first, to ensure that PUCO will not be preempted in its "current limited state regulation over rates and market entry,"³ and second, to "ensure that federal law does not prevent" PUCO from asserting, in the future, "jurisdiction over matters relating to the above-described statutory authority. . . ."⁴

The clear language of Section 332 of the Communications Act of 1934, as amended (the "Act" or "Communications Act"), however, preempts state regulation, "limited" or otherwise, of rates and market entry of CMRS providers unless the state properly petitions the Commission to authorize such regulation.⁵ PUCO's Statement does not satisfy the requirements for such a petition. Accordingly, the FCC should (1) dismiss the Statement for failure to make the necessary showings to support continued regulation and for being impermissibly vague,⁶ and (2) explicitly declare

3 Statement at 2.

4 Id.

5 47 U.S.C.A. § 332 (West Supp. 1994).

6 See, e.g., 47 C.F.R. § 1.41 (requiring that informal requests for FCC action state with specificity the relief requested).

that PUCO's existing rate and entry regulation of CMRS providers described in the Statement is preempted.

I. INTEREST OF SPRINT CELLULAR COMPANY

Sprint Cellular Company operates and manages cellular systems in the following Ohio service areas: Toledo MSA, Lima MSA, Mansfield MSA, Youngstown-Warren MSA and Ohio RSAs 2, 5, 6 and 11. Nationwide, Sprint Cellular Company serves more than 880,000 subscribers located in more than 85 service areas. Sprint Cellular Company is a subsidiary of Sprint Corporation, a diversified communications company.

II. BACKGROUND

Section 332 of the Communications Act preempts state and local rate and entry regulation of all CMRS, effective August 10, 1994. Section 332 authorizes the states only to regulate other terms and conditions and, where CMRS is a substitute for landline exchange service for a substantial portion of the communications of the state, to ensure universal availability of telecommunications service at affordable rates.

Section 332 permits, however, the states to petition the FCC for authority to regulate rates in two specific circumstances. First, states having rate regulation in effect as of June 1, 1993 may petition the FCC

to continue exercising authority over such rates.⁷ Any such petition to continue existing rate regulation must have been filed by August 10, 1994.⁸ Second, a state may at any time petition the FCC for authority to impose new rate regulation.⁹

State petitions submitted pursuant to either prong of Section 332(c) must include a factual showing.¹⁰ The CMRS Second Report and Order outlines numerous categories of factual information that can be provided by state authorities to support rate regulation of CMRS providers.¹¹

III. ARGUMENT

A. PUCO's Existing Rate And Entry Regulation Of CMRS Providers Is Preempted By Section 332

Certain PUCO regulations are described by the Statement as being "limited state regulation over rates and market entry"¹² of CMRS providers. To the extent that any existing PUCO rules constitute rate or entry

7 47 U.S.C.A. § 332(c)(3)(B) (West Supp. 1994).

8 Id.

9 Id. at § 332(c)(3)(A).

10 Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1504 ("CMRS Second Report and Order").

11 Id.

12 Statement at 2 (citing Ohio Rev. Code Ann. §§ 4905.26, 4905.33, 4905.35, 4905.16, 4905.31 & 4905.48).

regulation of CMRS, limited or otherwise, these rules clearly have been preempted by Section 332.

To be sure, Section 332 sets forth two methods by which states may petition for authority to regulate rates and market entry. PUCO has not satisfied the requirements for either method, however.

First, a state could have petitioned the FCC to continue state rate regulation that was in effect on June 1, 1993, so long as it did so prior to August 10, 1994. The PUCO rate and entry regulations referenced by the Statement were in effect on June 1, 1993.¹³ PUCO's pleading, however, does not purport to be a petition to preserve those regulations. PUCO styles its pleading a "Statement," and insists that it "does not presently set rates or limit market entry."¹⁴ Although PUCO notes that it means to "preserve [its] rights,"¹⁵ its Statement fails to make the evidentiary showing required by Section 332, as discussed below. Thus, the Statement does not constitute a properly crafted petition to preserve existing rate and entry

13 See Commission Investigation into the Regulatory Framework for Telecommunications Services in Ohio, Case No. 84-944-TP-COI, 66 P.U.R. 4th 572 (1985) (Opinion and Order); Phase II of the Commission's Investigation into the Regulatory Framework for Competitive Telecommunications Services in Ohio, Case No. 86-1144-TP-COI, 1988 Ohio PUC LEXIS 729 (Finding and Order 1988).

14 Statement at 1.

15 Id. at 2.

regulation. PUCO is therefore barred from enforcing any existing rate and entry regulations.

Second, a state may at any time petition for authority to regulate rates and entry by making a proper evidentiary showing. Section 332 requires a state to demonstrate that either (1) CMRS market conditions fail to protect subscribers adequately from unjust or unreasonable rates or from rates that are unjustly or unreasonably discriminatory, or (2) such market conditions exist and CMRS is a replacement for a substantial portion of the telephone landline exchange service within the state.¹⁶

The FCC has interpreted the statutory provision as requiring that in submitting petitions for authority to regulate rates, "states must submit evidence to justify their showings."¹⁷ The CMRS Second Report sets out in some detail the types of evidence that could be presented.¹⁸ For example, a showing can provide such information as the number of CMRS providers in the state, the types of services offered by these providers, trends in customer base, rate information for each CMRS provider, and an assessment of substitutability of CMRS services offered in the state.¹⁹

16 47 U.S.C.A. § 332(c)(3)(A)(i)-(ii) (West Supp. 1994).

17 CMRS Second Report at 1504.

18 Id. at 1504-05.

19 Id.

PUCO concedes the requirement of a factual showing by reciting the language of the CMRS Second Report.²⁰ Despite reciting this language, however, PUCO does not provide any of the suggested types of evidence. Indeed, the Statement contains absolutely no discussion of conditions in the CMRS market in Ohio.

If PUCO is arguing that it does not need to file a Section 332(c) petition because its "limited" rate and market entry regulation constitutes permissible regulation of "other terms and conditions," it has failed to offer any support for this contention. PUCO is either regulating rates and market entry or it is not. It is the view of Sprint Cellular Company that PUCO is, in fact, regulating rates and entry. If, for example, in administering its complaint process, PUCO concludes that cellular wholesale rates may be unduly discriminatory, it would presumably order a change in rates. This would be rate regulation, which PUCO is prohibited by statute from engaging in absent express authorization by the FCC.²¹

Nor may PUCO regulate the rate component of inter-carrier roaming agreements. Although PUCO contends that only regulation of end-user rates has been preempted, Section 332 specifically prohibits states from having "any

²⁰ Statement at 3-4.

²¹ Sprint Cellular Company does not contend, however, that PUCO is preempted from considering customer complaints that are totally unrelated to rate and entry issues.

authority to regulate . . . the rates charged by any commercial mobile service"22 Thus, on its face, Section 332 preempts any and all state regulation of any CMRS rate, regardless of whether the rate is charged to a retail customer or to another CMRS carrier. PUCO's entire scheme of "limited" rate and entry regulation of CMRS providers is therefore preempted.

B. PUCO's Right To Engage In Future Rate And Entry Regulation Is Preserved By Statute, Contingent Upon PUCO Properly Petitioning The FCC

PUCO notes that its Statement is intended to preserve "on a prospective basis" its right to engage in "limited" rate and entry regulation.²³ Section 332 already preserves that right, however, contingent upon PUCO properly petitioning the FCC. As noted above, PUCO's Statement does not constitute a petition to initiate rate regulation because it fails to make the requisite evidentiary showing regarding CMRS competition in Ohio. If PUCO wishes to revisit the issue of rate and entry regulation for CMRS in the future, it retains its statutory right to petition the FCC and make the proper evidentiary showing.

22 47 U.S.C.A. § 332(c)(3)(A) (West Supp. 1994) (emphasis added).

23 Statement at 2.

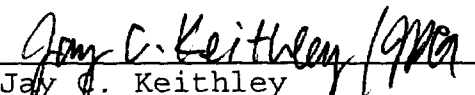
CONCLUSION

PUCO's existing rate and entry regulation of CMRS providers has been preempted by statute. Although it is not entirely clear what relief PUCO seeks in its Statement, it is clear that the FCC may not grant rate regulation authority based upon the unsupported declarations contained in the Statement. The Statement, therefore, should be dismissed in its entirety. The FCC also should explicitly declare PUCO's existing rate and entry regulations, including those described in the Statement as "limited" rate and entry regulations, to be preempted.

Respectfully submitted,

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September 19, 1994

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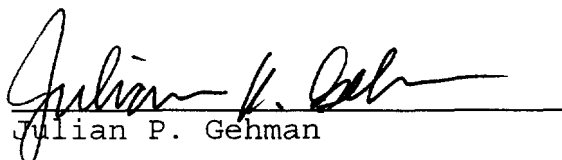
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*Placed in the U.S. mail, first class, postage prepaid.